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In the

Supreme Court of the United States

October Term, 1967

No. 857

JAMES MILLER, a/k/a FRANK JAMES COPPOLA
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITIONER'S SUPPLEMENTAL MEMORANDUM

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SUPPLEMENTAL MEMORANDUM

In the first question presented in the Petition for Certiorari in the above entitled case -- relating to threats made to three members of the jury during the trial -- petitioner urged this Court summarily to reverse the case for a new trial. Since it might possibly appear preferable to some members of the Court to remand for a hearing on the full facts and circumstances regarding the threats, petitioner believes that

the Court should be informed of developments which have occurred relative to this issue in the District Court since the petition was filed. These developments leave no doubt that a reversal for a new trial is the only feasible, appropriate, or just remedy.

* * * *

As soon as he learned that the defense had finally obtained interviews of the Miller jurors about the threats that were made to them, the District Judge who presided at the trial and whose judgment is sought to be reviewed in this petition ordered the United States Attorney to conduct an investigation of the defense's investigation. Counsel were notified of the investigation and asked to respond on December 20, 1967. They immediately discontinued their investigation and responded to the courts.

On February 5, 1968, the judge issued an order to show cause why the defendant, his counsel, and all others acting on his behalf should not be enjoined from contacting the Miller jurors in any way. The defense then requested permission to subpoena three

of the jurors to the hearing but the court "declined to act on the motion."

The hearing was held on March 4, 1968. On March 28, 1968, the District Judge issued an order enjoining the defendant, his counsel; and all acting on behalf of the defendant "from making any inquiry of any of the jurors who comprised the petit jury . . ." The court's opinion (attached as an appendix hereto) and the record of the hearing (certified to and lodged with the clerk of this Court), are submitted to the Court so that it may get the full picture of the bewildering frustrations encountered by defense counsel in their efforts to get justice for James Miller.

At the hearing, one of defense counsel testified about his direction of an investigation of the jurors, stating that his objective at the outset of the investigation was to gather information with which to prove the fact that "improper communications to the jurors . . . contaminated the trial and deprived [his] client of an impartial trial by jury and the right to

confront witnesses." (R. 24). He further stated that he was interested in learning from the jurors the truth of the Government's representation to the court of appeals that it had investigated the threats and found harmless cocktail party gossip (R. 25, 51), and whether the judge had ordered some of the jurors not to discuss the threats with representatives of the defense (R. 35). At the request of the judge, he submitted copies of written instructions (in questionnaire form) that he had given the investigator (R. 27). These forms were admitted into evidence at the behest of the defendants. (R. 80).

Counsel also testified that the investigator, Miss Samon, learned early in the investigation that the jurors during the trial had discussed the threats with a state trooper, a fact which hadn't been disclosed to the judge. (R. 37). Counsel also testified that he personally corroborated the discussion with the trooper. (Id.). The court said that it wasn't interested in hearing about the discussions between

the jurors and the state trooper (Id). When the attorney for petitioner's counsel explained that he was trying to show that further investigation was warranted because of the discovery of improper communications in addition to the threats which were disclosed at trial, the judge said that he wasn't concerned with that (R. 38, 39). The judge's view was that the Court of Appeals had said that he had adequately examined the jurors during the trial and that should have been the end of the matter (R. 40). When reminded that there were improper communications about which even he and the Court of Appeals had been uninformed, the judge called that "quite beside the point." (R. 41). He implied that any interviewing of jurors after the fact, for any reason, regardless of circumstances, was illegal, and asked for authority to the contrary. (R. 43). He got it: Opinion 319 of the Committee on Professional Ethics of the American Bar Association (R. 44), and Parker v. Gladden, 385

U.S. 363. He was also informed that the Government had stated in oral argument to the Court of Appeals that the defense was free to investigate (R. 51), and had said in footnote 9 of its brief in the Court of Appeals that the defense had not been denied permission to investigate but, on the contrary, "ever since the hearing on September 26, 1966, counsel has been free to pursue the matter and seek to present to the trial court any new facts not previously disclosed by the court's own inquiry." (Defense exhibit 1, R. 54).

The investigator also testified. She stated that her affidavit (the one attached to Petitioner's reply brief in this Court) was true. She further testified, in amplification of her affidavit, that jurors told her that they had associated the threats with dope peddlers in Torrington (the jurors' neighboring town) whom they associated with the defendant (R. 68), and that this had influenced their decision in the case (Id.). Other jurors also said that they had heard that defense counsel was being paid $45,000 per week for the trial and they concluded that no innocent man could afford to pay an attorney that much (R. 67, 68). At this

point in the proceedings, the judge refused to hear any more (R. 69-71). Counsel then offered to prove that one of the jurors had said that all the jurors knew of the threat (R. 71); that the state trooper had told Miss Samon that in his discussions with the jurors (during trial) he "indicated that the probable source of the threat to Mr. Lester was the dope peddlers in Torrington . . ." (R. 72).

No evidence of any harassment or any improper treatment of the jurors in the course of the investigation was offered. All the evidence was to the contrary.

An extensive brief was submitted to the court by counsel for the defendants. The brief cited case upon case which clearly establish that the defendant's jury was unconstitutionally contaminated by the improper communications that were made to it: e.g., Mattox v. United States, 146 U.S. 140 (newspaper accounts that defendant had committed other crimes); Chambers v. United States, 237 F.2d 573 (8th Cir. 1916) (statement by deputy marshall about probable penalty upon conviction);

Holmes v. United States, 284 F.2d 716 (4th Cir. 1960) (statement by deputy marshall that one of the defendants was presently incarcerated on a prior conviction; newspaper account to same effect); Remmer v. United States, 350 U.S. 377 (someone asked a juror if he wanted to make some money; F.B.I. agent asked the juror about the matter); United States v. Kum Seng Seo, 300 F.2d 623 (3d Cir. 1962) (newspaper article read by jurors reported that defendant's bond had been set at $100,000 and that the heroin had been found in her room). Marshall v. United States, 360 U.S. 310 (newspaper account read by jurors reported two prior felony convictions); Parker v. Gladden, 385 U.S. 363 (bailiff expressed opinion that defendant was guilty). It was thus made clear that the jury in this case was more thoroughly and more poisonously contaminated than any jury in any case ever considered in a federal appellate court. (Despite the fact that the defense had been frustrated in its attempts to interview most of the

jurors).[1]

The court was also informed that counsel had located only one case in which the right of counsel to interview jurors to obtain evidence of contamination had even been questioned by a judge. In that case the trial judge who questioned the practice was reversed. Holmes v. United States, supra, reversing 183 F.Supp. 361 (E.D. So. Car., 1960).

The opinion of the American Bar's Committee on Professional Ethics, Opinion 319 (August 26, 1967), was introduced into evidencebelow. That opinion states, "Certainly, as to [jurisdictions] in which the testimony and affidavits of jurors may be received in support of or against the motion for a new trial, a lawyer in his obligation to protect his client must have the tools for ascertaining whether or not grounds for a new trial exist, and it is not unethical for him to talk to and question jurors."

1. Only six or seven of the jurors were interviewed before the court began its investigation (R. 32). Some of these were reluctant to discuss the threats because of fear (Id.), and others because of a belief that the judge had ordered them not to (R. 35).

With that factual and legal background -- a clear constitutional right to investigate and to produce evidence; enough evidence already gathered to justify a new trial several times over -- the judge below issued an order enjoining any investigation. Absent from what might appear to the uninformed as a relatively thoughtful and dispassionate opinion was any reference to A.B.A. Opinion 319 or to the dozen or more decisions holding the evidence sought both admissible and sufficient for a new trial. Absent also was any authority supporting the injunction.

In building a scaffold for his unprecedented injunction, the judge first lays down that no juror may be asked whether a threat or other improper communication influenced him (although the same judge, in this very case, had asked three of the jurors if the threats "will have no effect whatsoever upon your decision in reaching a verdict in the case." (Petitioner's Reply Brief, p. 3)). Upon this shaky foundation, he piles a series of platitudes about the sanctity of jury deliberations and comes up with the entirely novel decision that defense counsel are

never permitted to make any post-verdict inquiries of jurors for any purpose.

Quoting out of context a section of defendants' brief, in which it was acknowledged that jury deliberations and votes on the merits are generally immune from inquiry, the court implies that the defense virtually conceded that it was in error in seeking to obtain corroborating evidence of jury contamination. Omitted from the opinion was any reference to, or consideration of, the following argument from the brief, which completes the context:

> "Permitting impeachment by evidence of improper influence, however, tends to protect juries from such influence because losing parties are motivated to expose such influences and thus all parties, as well as the courts, learn of their existence and guard against them in the future. Moreover, if, as our system fundamentally assumes, potentially prejudicial influences upon juries are uncommon, then permitting such evidence should not upset a large number of verdicts nor provide a strong incentive for litigants, lacking a scintilla of probable cause, to fish the minds of jurors for the minnow of a mistake. The probability of finding a prejudicial communication would be too small, in the normal case, to hold any incentive for the investigation of jurors."

> "Permitting inquires of jurors regarding improper communications does not, in any event, stifle free debate in the jury room, bring the jury system into disrepute, or significantly increase the burden of jury service. On the contrary, such evidence is the backbone of 'the law's objective to guard jealously the sanctity of the jury's right to operate as freely from outside unauthorized intrusions purposefully made.' Remmer v. United States, 350 U.S. 377, 382. Unless litigants are free to prove improper influence and judicial remedies are available therefor, the jury system will be injured. The maintenance of public confidence in the jury system requires that the courts remain open to hear that the system was abused."

Although it was made unmistakably clear at the hearing that jurors were not asked to reveal any of their votes or deliberations (R. 33-4, 74-5), and there was no evidence that any juror had in fact revealed as much as a word of the deliberations, the judge opined that one of eighteen questions prepared for the interviewer by counsel did "not appear to relate to acts or declarations outside the jury room." Yet no one could reasonably interpret the question as calling for disclosure of acts or declarations inside the jury room, for it was framed one and one-half years after trial and expressly asked

for "names and dates of conversations [about the threats], proximity to trial, if possible." And, as earlier noted, none of the jurors who were interviewed apparently interpreted the question as calling for deliberations because none were revealed.

Ignoring the seventeen other questions and giving a distorted interpretation to the eighteenth, the court concluded that the jurors were asked an improper question. Because of this, apparently, the defense should be enjoined from asking any questions.

An even more fundamental misunderstanding is evidenced throughout the opinion, however: that everything which goes on in a jury room is sacrosanct. The court would apparently not permit disclosure of the fact that jury deliberations were carried on at the point of a gun. The most perplexing aspect of the court's premise in this regard is that the very case upon which it purports to rely, Mattox v. United States, 146 U.S. 149, reversed a conviction upon affidavits of jurors regarding statements made in the jury room during

deliberations. Several other authorities cited to, but ignored by the court, involved such communications. Chambers v. United States, 237 F.2d 573 (8th Cir. 1916); United States v. Kum Seng Seo, 300 F.2d 623 (3d Cir. 1962); Clark v. United States, 289 U.S. 1.

Under the mantle of "trimming the defendants' argument down to the area where it merits consideration," the court entirely disregarded defendant's arguments. Instead, it tailored itself a strawman: "jurors must always be open to unrestricted post-verdict inquiry and investigation." What defendants argued for was the constitutional right to inquire of jurors about prejudicial, extrinsic communications. Even that narrow and unexceptionable argument was not necessary to support the right to investigate in this case, for, unlike the petitioner in Parker v. Gladden, who "although unaware of any irregularities . . . commenced 'shooting in the dark'", 385 U.S. 363, 366 (dissenting opinion), the defense began its investigation with record evidence that prejudicial threats had reached the jury.

Ostensibly to protect jury-room deliberations, the judge concluded that it is improper not only to ask if a threat or other extrinsic communication affected the character or quality of the deliberations (a question which the defense had not asked), but also to inquire about the impact of a threat upon the juror's mind at the time, prior to the deliberations, that the threat was received. Thus, in the court's view, a juror cannot even be asked if the threat scared him or affected his belief in the defendant's guilt.

The judge quotes at length the instructions he gave to the jury not to discuss the case outside the courtroom. He concludes, amazingly, that these instructions "should have been sufficient to guarantee [Miller] a fair trial" (n. 3), choosing not to deal with the fact that, by their own admission, the jurors repeatedly disobeyed these instructions.

Acknowledging that prohibiting counsel from interviewing jurors about contaminating communications may occasionally cost a defendant his constitutional rights

the judge says that jurors will usually reveal improper communications to the court. He cites the fact that one of the jurors revealed the threats in this case as proof of that prediction, again overlooking the fact that numerous prejudicial communications -- including a report about exorbitant counsel fees and discussions thereof, a request of a state trooper for protection, and a discussion with that same policeman about the probable source of the threats -- were not disclosed to the court.

The most baffling conclusion in the entire opinion is that all of the questions asked of the jurors "were in no way related to a search for new communications." It was obvious at the hearing that the judge wanted to believe that this was the case, but the evidence was wholly to the contrary. Counsel repeatedly adduced evidence of new communications which were not disclosed at the trial, which were the subject of the investigation and which they claimed justified further investigation.

Having thus disregarded the facts, the court concluded that the investigation was designed merely to "rake up the past in an effort to find some basis for reading into it some features which the defense would like to stress on another motion for a new trial."[2] And since the court of appeals had affirmed his handling of the threats at the trial, that was "the law of the case."

The opinion's distortions and mutilations are more than matched by its repetition of platitudes in place of facts, reason, or authority. The court tosses off the truism that, "If third hand rumors of ambiguous threats from unknown sources would always require a mistrial or a new trial where discovered only after verdict - sinister or even innocently meddlesome persons could, with a few words, make a shambles of the jury system." The court thus reveals its evaluation of the evidence offered below,

2. While the efforts of the defense to protect the defendant from the prejudice of the threats, which began with a motion for mistrial during the trial, may fairly be called persistent, they can hardly be thought belated.

despite the absence of evidence that the threats were "third hand rumors" and despite the record fact that the juror was warned that he could expect bodily harm if he didn't return the right verdict. The newly discovered facts that the jurors were frightened, sought police protection, and were told by a policeman that the threats came from dope peddlers, are also apparently regarded by the court as too trivial to merit consideration. If the court were really concerned with preserving the jury system it should have granted a mistrial or a new trial. Nothing would more surely "make a shambles of the jury system" than general acceptance of the views adopted below.

The latest chapter in United States v. Miller is a source of bewilderment to counsel. One thing, however, clearly emerges: a remand for a hearing on the jury threats would be an empty remedy. The District Court has squarely held that it will not permit counsel to interview the juror-witnesses in preparation for a

hearing, and has clearly indicated that it will neither permit counsel to ask the witnesses any relevant questions at a hearing, nor grant a new trial if, despite all obstacles, an overwhelming case of prejudice is shown.

The defendant has been all but forgotten in the procedural poker played below. Slippery slogans and irrelevant axioms have obscured the fact that James Miller did not get a fair chance to establish his innocence. If justice is ever to be done in this case, it must be done by this Court.

Respectfully submitted,

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April, 1968